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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

April 12, 1991

Mr. Dan W. Heard
Attorney at Law
P. O. Box 32
Port Lavaca, Texas 77979-0032

OR91-171

Dear Mr. Heard:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 11314.

As attorney for the Memorial Medical Center in Calhoun County (the medical center), you inquire whether certain information is subject to required public disclosure under the Open Records Act. The medical center received an open records request for, *inter alia*, the complete personnel file of each former employee who within the past two years has been fired for insubordination or extreme negligence. You have submitted to this office various documents for review that you believe to be excepted from public disclosure.

You contend that a "Potential Liability Report" and an "Incident Report" come under the protection of section 3(a)(1) of the Open Records Act. Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You contend that the liability and incident reports are medical records and therefore deemed confidential by law. The Texas Medical Practices Act, V.T.C.S. article 4495b, provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician *that are created or maintained by a physician* are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b) (emphasis added). We note that although these two reports contain some "medical" information concerning a particular patient, neither report was created or maintained by physician, but rather by hospital management for administrative purposes. Consequently, the two reports do not constitute confidential "medical records" for purposes of article 4495b. You must, however, withhold pursuant to section 5.08(b) the

"Physical Examination of Employee Applicant" and the letter from a physician regarding an employee/patient's physical condition.

Section 3(a)(1) of the act also protects the common-law right of privacy. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. This office believes that only the identity of patients contained in the requested documents may be withheld pursuant to the common-law privacy aspect of section 3(a)(1).

You also contend that certain retirement records in one of the personnel files are made confidential by section 803.402 of the Government Code. We note, however, that section 803.402 applies only to "records . . . that are in the custody of the system." The records at issue are in the custody of the medical center, not the respective retirement system; section 803.402 is therefore inapplicable. You must, however, withhold the "Change of Beneficiary" form as confidential background financial information. *See* Open Records Decision No. 523 (1989).

To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Further, the governmental body's attorney must show that the requested material relates to the litigation. *See* Open Records Decision No. 551 (1990).

Although you contend that the incident report, liability report, and a "Counselling Form" come under the protection of section 3(a)(3), you have not demonstrated how these three documents meet the section 3(a)(3) tests; consequently, unless you submit to this office within ten days of receipt of this letter additional facts that demonstrate that litigation regarding these matters is pending or reasonably anticipated at this time, you may not withhold these documents pursuant to section 3(a)(3).

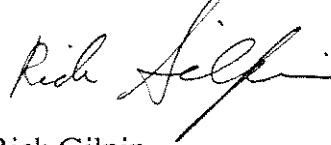
You further contend that an EEOC form that contains the substance of a complaint filled by an employee may be withheld pursuant to section 3(a)(3). This office has previously held that such forms are public information. Open Records Decision No. 139

(1976) (copy enclosed); *See also* Open Records Decision No. 212 (1978) (outlining bounds of employee privacy) (copy enclosed). Consequently this record must be released.

Section 3(a)(11) of the act excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's deliberative process. Open Records Decision No. 470 (1987). Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinion, and recommendation. Open Records Decision No. 450 (1986). We have marked one sentence in the incident report that may be withheld pursuant to section 3(a)(11). The information contained in the liability report and the two "Notice of Separation" forms do not consist of the type of information section 3(a)(11) was intended to protect.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-171.

Yours very truly,



Rick Gilpin
Assistant Attorney General
Opinion Committee

RG/RWP/lcd

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Enclosures: Open Records Decision Nos. 331, 328, 212, 139
Marked documents

cc: Tom Garner, Jr.
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